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No. 08-482

Supreme Court, U.S.
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In The
Supreme Court of the United States

MARCUS A. BORDEN,

Petitioner,

v.

SCHOOL DISTRICT OF THE TOWNSHIP OF EAST BRUNSWICK; BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK; AND DR. JO ANN MAGISTRO, SUPERINTENDENT, SCHOOL DISTRICT OF THE TOWNSHIP OF EAST BRUNSWICK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Through his petition, Coach Borden showed that this case squarely presents the issue whether the Establishment Clause allows him to engage in silent gestures of respect when his team chooses to engage in prayerful activity. Pet. 12–15. We showed that this constitutional issue has generated conflict among the federal courts of appeals, Pet. 16–22, 23–28, and is one of recurring national importance, Pet. 28–33. Finally, we showed that this case squarely presents that issue for resolution by this Court. Pet. 29–31. Respondents' Brief in Opposition ("Opp.") calls none of this into question.

Instead, much of respondents' brief is devoted to an incendiary narrative designed to impugn Coach Borden's character and motives—in stark contrast to the briefing before the district court, when respondents credited Borden as an "honorable man." *Compare* Opp. 1–15 *with* R.15 at 4. Specifically, respondents invoke a series of unsubstantiated "facts" concerning alleged complaints about Coach Borden's practice of leading team prayers—activity that has ceased and that has nothing to do with the question presented here. Opp. 2–3. Critically, Coach Borden's complaint sought a declaratory judgment regarding his *prospective* silent gestures of respect, *not* his past conduct leading prayers. J.A. 67–83. As the respondents' allegations relate only to Coach Borden's *past* conduct of leading the team prayer, not his request for a declaratory judgment concerning his silent gestures of respect for

student-led prayer, they are irrelevant to the resolution of this case.[1]

With this underbrush cleared away, two salient points emerge. First, the Third Circuit's Establishment Clause holding is, in fact, essential to the outcome of this case, based on either a crucial concession by respondents in the district court or on the Third Circuit's reliance on that holding to reject certain of Coach Borden's affirmative claims. Second, as noted, this case presents unsettled issues of national importance that warrant this Court's intervention.

At bottom, this case reduces to a simple yet important question of nationwide significance: What can public school teachers, coaches, and staff do when students pray? According to respondents, the Establishment Clause basically requires a teacher to leave the room when his or her students engage in voluntary prayer—a position unsupported by this Court's jurisprudence.

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[1] Respondents also characterize Borden's conduct—specifically his email to the team co-captains prior to the 2006 season concerning whether the players intended to lead team prayer—as coercive. *See, e.g.*, Opp. 8–9, 26–27. Even if respondents' characterization is accepted—although neither the district court nor two of the Third Circuit panel members did so—that only goes to the merits of the Establishment Clause question presented rather than the suitability of this case to decide that question.

I. The Third Circuit's Establishment Clause Holding Is Outcome Determinative.

This case is an excellent vehicle for this Court to address petitioner's Establishment Clause arguments. First, respondents fail either to acknowledge or to address that *they*, through a concession made before the district court, made the Establishment Clause issue case-dispositive. Second, the Third Circuit's resolution of several of Borden's affirmative-rights claims expressly turned on its Establishment Clause holding.

1. The Establishment Clause issue is outcome-determinative in this case precisely because respondents made it so by conceding, in their summary judgment briefing in the district court, the validity of Coach Borden's affirmative claims if Coach Borden defeated their Establishment Clause defense. *See* Pet. 5–6 (quoting R.20 at 46), 7.[2] Respondents' concession was a binding judicial admission for purposes of summary judgment. *See, e.g.*, *Berckeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195, 211 (3d Cir. 2006) ("Judicial admissions are concessions in pleadings or briefs that bind the party who makes them.") (collecting cases); 11 James Wm. Moore et al., MOORE'S FEDERAL PRACTICE § 56.14[d][i] (2008) ("Statements made in open court on the record or other representations to the court, including admissions in correspondence, may qualify as an admission for

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[2] Coach Borden anticipated respondents' Establishment Clause defense in his initial complaint seeking declaratory judgment, where he alleged that his requested acts could not be "reasonably perceived as government establishment of . . . religion." J.A. 72.

purposes of seeking summary judgment."). This Court has long recognized that such binding concessions before the district court cannot be retracted on appeal. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 427–428 (2006) (relying upon government's concession before district court that plaintiff had established *prima facie* case for purpose of assigning burden of proof in connection with preliminary injunction); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 215 (1976) (plaintiff not permitted to revive abandoned theory of case on appeal).

Having conceded the merits of Borden's affirmative claims before the district court in favor of exclusive reliance on their Establishment Clause defense, respondents "cannot abandon [the] issue and then, after an unpalatable decision by the trial judge, on appeal, by drawing on the pleadings resurrect the abandoned issue." *Edward B. Marks Music Corp. v. Cont'l Record Co.*, 222 F.2d 488, 492 (2d Cir. 1955). Though they protest now that the Third Circuit ruled in their favor and denied Coach Borden's affirmative claims, respondents cannot escape that they conceded that Coach Borden was entitled to judgment on those claims if he prevailed against respondents' Establishment Clause defense. But instead, respondents cling to a characterization of the case that "bears little or no resemblance to what went on before the District Court," a time when "the parties were in good faith trying to avoid an Establishment Clause problem, with defendants explicitly agreeing to abide by the District Court's decision." Pet. App. 71a (Barry, J., concurring).

2. Even if the Third Circuit properly allowed respondents to retract their concession on appeal, the

court of appeals' Establishment Clause holding is still relevant to the outcome of this case. Respondents assert that the Third Circuit admitted that its Establishment Clause analysis is "irrelevant to the outcome of the *case*," Opp. 12 (emphasis added), but the Third Circuit's statements cited by petitioners only relate to Coach Borden's *free speech* claims. *See* Opp. 12 (citing Pet. App. 44a).

The Third Circuit's disposition of Coach Borden's freedom of association, expressive association, and due process claims relied on the court's Establishment Clause holding. *See* Pet. App. 41a (freedom of association claim: "[W]e find that the guidelines prohibiting him from participating in the players' prayer activities do not interfere with his freedom of association rights, particularly because he is violating the Establishment Clause while doing so. *See infra* Part III.C."); Pet. App. 41a–42a n.15 (expressive association claim: "As discussed in part III.C of this opinion, *see infra*, the School District has the right to issue its guidelines, particularly because it needed to prevent Borden from violating the Establishment Clause. Therefore, we find any expressive association argument that Borden is attempting to make to be invalid."); Pet. App. 43a (federal due process liberty claim: "Borden has no interest—privacy, liberty, or otherwise—in behavior that violates the Establishment Clause."); Pet. App. 43a n. 16 (state due process claim: "[T]he balancing here has the same result as under federal constitutional principles because the public need—to prohibit Establishment Clause violations, which as discussed below, are present in this case—is so great. Therefore, Borden's [state due process claim] argument fails.").

Having linked the merits of the respondents' Establishment Clause defense with the merits of Borden's freedom of association and due process liberty claims, the lead opinion recognized that it was "necessary" to decide the Establishment Clause issue. *See* Pet. App. 45a n.17. As a result, there is no question that the Third Circuit's Establishment Clause holding is an outcome-determinative—and therefore reviewable—basis for its rejection of Borden's freedom of association, expressive association, and federal and state due process claims.

II. The Question Presented Raises an Unsettled Issue of National Importance that Deserves This Court's Attention.

1. Notwithstanding respondents' contrary assertions, Coach Borden's Establishment Clause challenges are not disposed of by any prior decisions of this Court. To support their claim, respondents both mischaracterize Coach Borden's arguments and misinterpret this Court's Establishment Clause jurisprudence.

a. At the outset, respondents assign to Coach Borden a straw-man argument: "According to Borden, this Court has allowed consideration of history solely to determine unconstitutional purpose under the *Lemon* test." Opp. 17–18. Coach Borden has never claimed that historical concerns have had no role in this Court's endorsement-test jurisprudence. *See* Pet. 16 ("[H]istory has long played a role in the endorsement test's 'reasonable observer' standard[.]"). Rather, Coach Borden objects to the *manner* in which his history was used by the Third Circuit—to constitutionally invalidate his subsequent course of

permissible secular conduct that a majority of the panel agreed did not, in any objective sense, constitute an endorsement of religion. *See* Pet. 17 ("[T]his Court has never relied upon history alone to invalidate a secular act by a state actor.")

Coach Borden showed that this Court's reliance upon history in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), does not dispose of this case. Though the Court certainly "looked to history" in *Santa Fe*, *see* Opp. 18, it did so only after determining the facial unconstitutionality of a school policy that "by its terms, invite[d] and encourage[d] religious messages." 530 U.S. at 306. Given that the policy at issue in *Santa Fe facially endorsed* religion, there was little question that it also would be *perceived* as an endorsement of religion by a reasonable observer. 530 U.S. at 306–307. But the *Santa Fe* Court used history only to corroborate the established unconstitutionality of the policy at issue; it never suggested that a religious history, standing alone, could transform a subsequent secular act, such as Borden's gestures, into a constitutional violation. *Santa Fe* cannot, therefore, support the interpretation respondents assign to it.[3]

b. In the petition, Coach Borden showed that under this Court's decision in *Board of Education v. Mergens*, the Establishment Clause neither requires nor permits

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[3] Indeed, even the specific holding respondents assign to *Santa Fe* is erroneous: the observation that a student would "'unquestionably perceive the inevitable pregame prayer as stamped with [the] school's seal of approval,'" Opp. 18–19, is part of the Court's discussion of the policy's *contemporaneous context*, not its prior history. *Compare* 530 U.S. at 307–308 (discussing context) *with id.* at 308–310 (discussing history).

the school district to forbid Coach Borden from showing silent respect towards his players' voluntary acts of student-led prayer. Otherwise, the situation Justice Kennedy warned of in his *Mergens* concurrence will have come to pass—literal application of the endorsement test will be used to require individuals such as Coach Borden to show affirmative hostility towards his players' religious expression. *See* Pet. 24–26 (quoting 496 U.S. 226, 261 (1990) (Kennedy, J., concurring)).

Respondents claim that because this Court has never treated "bare nonparticipation . . . as prohibited religious animus," petitioner's hostility concerns are misplaced. Opp. 21. Yet the record confirms that Coach Borden's nonparticipation actually alienated his players, chilling their free religious exercise rights. Pet. 4 (citing J.A. 169). The district court correctly recognized the absurdity that respondents' position creates, where the requirements of the Establishment Clause must hinge on the subtle distinctions between degrees of body language:

> What is the coach to do? Should he leave the room? Turn his back? Stand at attention and not move a muscle? I don't think so. May he clasp his hands? At what angle or degree is his head considered bowed? May he crouch down, bend a knee, take a knee, or completely kneel?

Pet. App. 85a–86a.

Further, respondents all but acknowledge that their view of the Establishment Clause *requires* Coach Borden to evidence active hostility towards his players' religious practices, by suggesting that he would violate

the Establishment Clause even if he were to merely stand silently near his players during a voluntary pre-game prayer. *See* Opp. 22 ("[E]ven 'the act of standing or remaining silent [is] an expression of participation in . . . prayer' sufficient to give rise to Establishment Clause concerns." (citation omitted)). Judge Barry, in her concurrence below, criticized the extremity of respondents' position:

> Apparently, it is only Borden, given his prior history, who cannot constitutionally respond to constitutionally protected student-initiated and student-composed prayer but, if he can, we are not told what response might be permissible. Surely he would not be required to keep his head erect or turn his back or stand and walk away. *Any such requirement would evidence a hostility to religion that no one would intend.*"

Pet. App. 74a–75a (Barry, J., concurring) (footnote omitted).

This Court's prior decisions plainly do not dispose of Borden's petition. If anything, respondents' arguments before this Court only highlight the conflict between the decision below and this Court's holdings in *Mergens* and *Santa Fe*, as respondents make clear the lengths to which they demand Borden demonstrate active hostility towards his students' religious expression.

2. The need for guidance from this Court is critical given the uncertainty among the courts of appeals regarding the role history plays within a proper Establishment Clause analytical framework.

In an effort to minimize the conflict between the circuit courts, respondents either misunderstand or mischaracterize Coach Borden's claims. In the petition, Borden identified a series of decisions in which circuit courts recognized that objectively secular acts did not violate the Establishment Clause merely because they had a religious history. Pet. 20–22. By characterizing those decisions as fact-bound, Opp. 19–20, respondents disregard that those decisions establish a consistent legal rule—religious history does not, in and of itself, taint a subsequent permissible secular act. This legal rule of other circuits conflicts with the decision below.

In particular, respondents all but ignore *Doe v. Duncanville*, 70 F.3d 402 (5th Cir. 1995), the decision most factually analogous to—and legally in conflict with—the decision below. Though the *Duncanville* court upheld a school policy designed to avoid Establishment Clause concerns, the court made clear in its holding that nothing in the Constitution "compels [school] employees to make their non-participation [in student-initiated prayer] vehemently obvious or to leave the room when students pray[.]" *Id.* at 406. By contrast, respondents' brief makes clear that they believe the Third Circuit decision requires Borden to drastically separate himself from his students should they choose to pray. *See* Opp. 22. The decision below thus conflicts with *Duncanville*.

Such inter-circuit conflicts are manifestations of widespread confusion over application of the endorsement test. Pet. 28–29. Though respondents insist that this Court has resolved this confusion by providing context-dependent variations of the endorsement test's "reasonable observer" standard,

Opp. 23, their argument only proves petitioner's point: Though the endorsement test may have been originally intended to create a clear, unified, and consistent legal standard, it has failed to do so in practice.

Indeed, the disagreement within the Third Circuit panel serves as the most palpable example of circuit-level confusion in application of the endorsement test—a fact that respondents disregard. Contrary to the respondents' claim, the panel did not "part[] company" over the outcome of some remote hypothetical. Opp. 22. Rather, they disagreed over the core issue of whether the Establishment Clause forbade Coach Borden, *in this case*, from engaging in his requested acts of silent respect. *See* Pet. App. 72a ("I write separately, however, to express my view that whether or not Borden's past prayer activities with the team signaled an unconstitutional endorsement of religion . . . a reasonable observer would not conclude that the 'respectful display' he proposes would violate the Establishment Clause.") The result was a three-way split, as one judge found that Coach Borden's proposed conduct unquestionably *would not* violate the Establishment Clause, Pet. App. 72a, a second found that it unquestionably *would*, Pet. App. 56a–57a, and a third found that the conduct would be unconstitutional if engaged in by Coach *Borden* but not by some *other* coach, Pet. App. 53a–56a.

Were Establishment Clause jurisprudence as clear as respondents pretend, such wide disagreement could never have developed. This case thus presents the Court with the opportunity to provide much-needed clarity to a confused area of the law, to the benefit of public school educators and students throughout the country who are in need of this Court's guidance.

3. Finally, respondents make no serious effort to deny that the question raised by this case regarding the proper scope and application of the Establishment Clause is of national importance. Moreover, the efforts of *amici* demonstrate the importance of the Establishment Clause issue. Before this Court, several *amici* have joined petitioners in challenging the Third Circuit's Establishment Clause holding as being both legally flawed and endemic of confusion in the lower courts requiring this Court's attention. *See generally* Br. of Am. Cur. Southeastern Legal Foundation *et al.* Further, the American Football Coaches Association has articulated the importance of the Establishment Clause issue to coaches across the country, who encounter similar expressions of student-led prayer on a regular basis. *See generally* Br. of Am. Cur. American Football Coaches Association. Indeed, when respondents first appealed the district court's ruling in favor of Borden to the Third Circuit, *twenty* different *amici* rushed to support respondents' efforts to overturn the district court's Establishment Clause decision. Pet. App. 3a–4a. Respondents' claim that the case has suddenly become unimportant rings hollow.

CONCLUSION

For the reasons provided above and in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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